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No. 88-6677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HORACE BUTLER,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, and the Attorney General of South Carolina, T. TRAVIS MEDLOCK,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

Did the Court of Appeals violate the rule announced in *Shea* v. *Louisiana* by denying petitioner the benefit of *Edwards* v. *Arizona*, despite the fact that petitioner's conviction was not yet final on direct review at the time *Edwards* was decided?

II.

Did the Court of Appeals' majority misread *Arizona* v. *Roberson* as creating a "new" rule of constitutional law?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, denying Butler's petition for habeas corpus is unreported and is reproduced in the Joint Appendix (J.A.) at 91-124. The initial panel opinion of the Court of Appeals for the Fourth Circuit, affirming the denial of habeas relief, is reported as *Butler* v. *Aiken*, 846 F.2d 255 (4th Cir. 1988), and is reproduced at J.A. 125-133. The order of the Court of Appeals denying rehearing and rehearing *en banc* is unreported. The order modifying the panel's decision on reconsideration of the order denying rehearing, and denying rehearing *en banc*, with five judges dissenting, is reported as *Butler* v. *Aiken*, 864 F.2d 24 (4th Cir. 1988), and is reproduced at J.A. 134-141.[1]

JURISDICTION

The order of the Court of Appeals denying rehearing and rehearing *en banc* was entered on December 2, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

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[1] The opinion of the South Carolina Supreme Court affirming petitioner's conviction and sentence of death is reported as *State* v. *Butler*, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982). The South Carolina Supreme Court's opinion affirming the denial of post-conviction relief is reported as *Butler* v. *State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S 1093 (1986).

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Horace Butler, a mentally retarded black person,[2] was convicted and sentenced to death for the murder of Pamela Lane. A key piece of evidence against him was his confession. The Court below found that this confession was obtained in violation of the Fifth Amendment principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988), but denied habeas corpus relief on the sole ground that *Roberson* should not be applied retroactively to petitioner's conviction, which had become final on direct review after *Edwards* but before *Roberson*. The pertinent facts are as follows.

Four Charleston County police officers arrested petitioner on the evening of August 30, 1980, on an assault charge—later dismissed—which was apparently unrelated to the murder of Pamela Lane.[3] The officers brought

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[2] The state court record reveals that petitioner has an I.Q. of 69 and a mental age of between seven and eight. Joint Appendix in Court of Appeals at 1207; 1222. When he ended his education at age sixteen, he had completed the fourth grade.

[3] The charges were unrelated only in that they did not involve the same underlying offense. The record compels the conclusion that at the time of petitioner's arrest on the assault charges he was a—if not the—prime suspect in the murder of Pamela Lane. The officer who arrested petitioner on the assault charge, Officer Eugene Frazier, was in charge of the investigation of the Lane homicide, and had been intensely investigating the case since August 24, 1980. J.A. 28-29. Officer Frazier subsequently ordered the interrogation which resulted in the statement involved in this case. J.A. 4.

petitioner to the Charleston County Jail, where he remained until his bond hearing late the following evening. J.A. 26, 4. Prior to the hearing, petitioner invoked his right to counsel by retaining a local attorney, W. McAlister Hill. J.A. 66.[4] Hill appeared with petitioner at the bond hearing on the evening of August 31. J.A. 65; 56. Petitioner was unable to post bond, and was returned to the county jail. Hill testified at the state post-conviction hearing that he warned the police against any further questioning of his client, but the officers claimed not to remember any such instruction. J.A. 115, 65, 56.

Shortly after the bond hearing, at 12:15 a.m. on September 1, the same four officers who had arrested petitioner on the assault charge brought him to the Charleston County Police Headquarters where they initiated an interrogation concerning the murder of Miss Lane. J.A. 115. After informing petitioner that they were

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[4] This Court recognized in *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), that a criminal accused has the "right to rely on counsel as a 'medium' between him and the State." Thus an accused can count upon counsel to serve as a buffer; and when he seeks the assistance of counsel this is properly viewed as an indication that he is unable "to cope with the pressures of custodial interrogation without counsel" being present. *Roberson*, *supra*, 108 S.Ct. at 2100. Counsel's role as a 'medium' is particularly important to a mentally retarded person such as petitioner because persons with mental retardation are, as a direct result of their disability, much more open to suggestion, more easily coerced by subtle police methods, and more likely to acquiesce in a police interrogation than a non-retarded individual. *See* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985). A person with mental retardation is not capable of maintaining continuing vigilance to protect his own interests in repeated interchanges with the police; after he obtains counsel, he needs the assurance that counsel will continue to serve as his protector in any subsequent police-initiated interrogation.

charging him with the Lane murder, the police officers questioned him for some five hours, during which time they obtained two separate *Miranda* waiver forms and two different statements regarding his participation in the crime. Both of these statements were introduced against petitioner at his trial. Petitioner was not returned to the county jail until 10:30 a.m., after traveling with the police to the scene of the crime.[5]

In January 1981, a Charleston County jury convicted petitioner of murder and sentenced him to death. While petitioner's case was pending on direct appeal to the South Carolina Supreme Court, this Court announced its decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Some nine months after *Edwards* was decided, on February 22, 1982, the South Carolina Supreme Court affirmed petitioner's conviction and sentence of death. *State* v. *Butler*, 277 S.C. 452, 290 S.E.2d 1, *cert. denied*, 459 U.S. 932 (1982).

After exhausting his state collateral remedies, *see Butler* v. *State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1093 (1986), petitioner filed the present habeas corpus proceeding in the United States District Court for the District of South Carolina alleging, *inter alia*, that his Fifth Amendment rights under *Edwards* had been violated by the police officers' initiation of interrogation about the murder of Pamela Lane, in the absence

[5] The record shows that petitioner's attorney, Mr. Hill, was not informed that the police planned to interrogate his client after the attorney left the bond hearing and petitioner was returned to the county jail. There is not the slightest evidence that Hill consented to any such interrogation. In fact, as was noted previously, Hill testified in the state collateral proceedings that he specifically instructed the police at the bond hearing not to talk to petitioner at all. J.A. 65.

of counsel, after petitioner had sought and obtained counsel's representation in connection with the assault charge. The district court, apparently unaware that petitioner's conviction had not yet become final when *Edwards* was decided, dismissed his *Edwards* claim on the grounds that he was not entitled to retroactive application of the "bright line" test enunciated in *Edwards*. J.A. 120-21. The district court rejected petitioner's reliance on *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987), a decision granting habeas corpus relief on facts identical in all material respects to those of petitioner's case. The district court concluded that it:

> need not consider the propriety of the principles established in *Espinoza* inasmuch as the underlying ruling in *Edwards* v. *Arizona* may not be applied retroactively. *Solem* v. *Stumes*, 465 U.S. 638 (1984). Petitioner was convicted January 24, 1981. The sentencing phase of his trial was concluded on January 26, 1981. *Edwards* was decided May 18, 1981.

J.A. 121.

The original panel decision of the Court of Appeals found that the district court erred in ruling that the "bright-line" rule established by *Edwards* v. *Arizona* did not apply to petitioner's case. The panel concluded that because petitioner's appeal was pending when *Edwards* was decided, *Shea* v. *Louisiana*, 470 U.S. 51 (1985), mandated that the *Edwards* rule be applied to petitioner's case. *Butler* v. *Aiken*, 846 F.2d 255, 257 (4th Cir. 1988); J.A. 129. However, the panel did not believe the "bright-line" rule of *Edwards* extended to the facts of petitioner's case.

> We fail to see how the actions of the Charleston police could fall within the intent of the Court in

> *Edwards* . . . . We see no reason for a different result simply because the custody was continuous.
>
> Properly initiated interrogation on entirely new charges does not intrude into an accused's previously invoked rights but rather offers that accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for truth by suppressing those statements.

846 F.2d at 258-59; J.A. 131-32. Therefore, the panel concluded that petitioner's statements were not obtained in violation of the Fifth Amendment. *Id.*

The same day that the Court of Appeals denied petitioner's request for rehearing and suggestion for rehearing *en banc*, *Butler* v. *Aiken*, No. 87-4004 (4th Cir. June 15, 1988), this Court announced its decision in *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988). On petitioner's motion for reconsideration, the Court of Appeals requested that the parties submit briefs as to the effect of the intervening decision in *Roberson*. On December 2, 1988, the panel of the Court of Appeals issued a modified opinion acknowledging that the procedures by which petitioner's statements were obtained were invalid under *Roberson*. The panel found that:

> the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*.

Butler v. *Aiken*, 864 F.2d 24, 25 (1988); J.A. 135. The panel further conceded that if petitioner's case was before the court on direct appeal, it would in all likelihood reverse the conviction and remand the case for a new trial. *Id.* The panel then examined the retroactive effect of *Roberson* in collateral proceedings in accordance with the three factors established by this Court in *Stovall* v. *Denno*, 388 U.S. 293 (1967):

> (1) the purpose of the new rule of law; (2) the extent of reliance by law enforcement authorities on the old standard; and (3) the effect of retroactive application upon the administration of justice. *Allen* v. *Hardy*, ___ U.S. ___, 106 S.Ct. 2878, 2880 (1986).

864 F.2d at 25; J.A. 135. Applying this test, the panel decided that petitioner could not claim any retroactive benefit from *Roberson*.

> The *Edwards-Roberson* limitations on police interrogation have only the most tangential relationship to truth finding. They are, rather, a part of the prophylactic protection accorded the Fifth Amendment right to counsel as a means of establishing "guidelines to the law enforcement profession." *Roberson*, 56 U.S.L.W. at 4592. The interrogation of appellant, while unquestionably contrary to the present "guidelines," was conducted in strict accordance with established law in 1980 [the date of petitioner's arrest]. We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980. On that dispositive issue, the record discloses no support for Butler's claim for habeas relief.

864 F.2d at 25; J.A. 136. In its retroactivity discussion, the modified panel opinion failed to cite or refer to this Court's decision in *Shea* v. *Louisiana*, *supra*, which held that

Edwards was applicable to all cases not yet final on direct review at the time *Edwards* was decided.

Dissenting from the denial of rehearing *en banc*, Chief Judge Winter, joined by four other judges, asserted that petitioner's conviction was obtained in violation of the Fifth Amendment. First, the dissent stated that petitioner's statements were constitutionally inadmissible under *Edwards* standing alone. 864 F.2d at 26; J.A. 139. Chief Judge Winter then stated that *Roberson* did not alter the rules of law set forth in *Edwards*.

> In sum, *Roberson* says that the law *is* and *has been*, since *Miranda*, that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation about *either* the crime he is suspected of having committed *or any other crime* until counsel has been made available, unless the suspect initiates further communication with the police. There is thus no retroactivity issue presented in the instant case.

864 F.2d at 27; J.A. 140-41 (emphasis in original) (footnote omitted).

This Court granted certiorari on May 1, 1989. J.A. 142.

SUMMARY OF ARGUMENT

The Court of Appeals acknowledged that petitioner's confession was obtained in violation of the constitutional principles delineated in this Court's decisions in *Edwards* v. *Arizona* and *Arizona* v. *Roberson*. Nevertheless, the panel held that *Edwards* and *Roberson* did not apply retroactively to petitioner's case because neither case had been decided at the time the police obtained the incriminating statements. The Court of Appeals' retroactivity holding is in direct conflict with *Shea* v. *Louisiana*, *Griffith* v. *Kentucky*, *Yates* v. *Aiken*, and *Teague* v. *Lane*. *Roberson* did not create a new rule of criminal procedure. Rather, it was merely a straightforward application of the constitutional principles set forth in *Edwards* v. *Arizona* to a somewhat different set of facts.

This Court has previously held in *Shea* v. *Louisiana* that the "bright line" rule of *Edwards* v. *Arizona* applies to all cases which were not yet final on direct review at the time *Edwards* was decided. Petitioner's case was pending on direct appeal in the South Carolina Supreme Court at the time of this Court's decision in *Edwards*. Thus, just as in *Yates* v. *Aiken*, this case presents no genuine issue of retroactivity at all, and the Court of Appeals' holding that petitioner was not entitled to the benefit of *Edwards* and *Roberson* must be reversed.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS DENYING PETITIONER THE BENEFIT OF THE RULE ESTABLISHED IN *EDWARDS* V. *ARIZONA* AND FOLLOWED IN *ARIZONA* V. *ROBERSON* IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SHEA* V. *LOUISIANA*, WHICH HELD THAT *EDWARDS* APPLIES TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THAT *EDWARDS* WAS DECIDED.

A. This Court's Decision In *Arizona* v. *Roberson* Did Not Create A New Rule Of Criminal Procedure, But Merely Applied The Constitutional Principles Established In *Edwards* In a Slightly Different Factual Setting.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated interrogation even if he has been advised of his rights." 451 U.S. at 484 (footnote omitted). Further interrogation in the absence

of counsel is permissible only if "the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85; *see also Solem* v. *Stumes*, 465 U.S. 638, 646 (1984). This "bright line" rule of *Edwards* has been consistently reaffirmed by the Court. *See, e.g., Michigan* v. *Jackson*, 475 U.S. 625 (1986); *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (applying the *Edwards* rule to invocation of the Sixth Amendment right to counsel).[6]

Last term, in *Arizona* v. *Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988), this Court applied the *Edwards* rule to a slightly different factual situation. In *Roberson*, the accused was arrested and advised of his *Miranda* rights. Roberson indicated that he wanted to speak with an attorney before answering any questions. While he was still in custody, a different officer questioned him about a different offense. After again being advised of his rights pursuant to *Miranda*, Roberson waived those rights and gave an incriminating statement to the police as to the second offense. The statement was suppressed by the trial court and the suppression order was affirmed on appeal. Certiorari was granted and this Court affirmed in turn. The Court held that Roberson's case was directly controlled by *Edwards* v. *Arizona*, and, therefore, the fact that the request for counsel occurred in the context of a separate investigation was without constitutional significance. 108 S.Ct. at 2098.[7]

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[6] *See also Moran* v. *Burbine*, 475 U.S. 412 (1986). In *Moran*, the majority, relying on *Miranda* and *Edwards* acknowledged that an accused is not subject to further police initiated interrogation if he "indicates in any manner, at any time, prior to or during questioning" that he desires the assistance of counsel. 475 U.S. at 420.

[7] The Court stated: "[t]hat a suspect's request for counsel should apply to any questions the police wish to pose follows, we think, not only from *Edwards* and *Miranda*, but also from . . . [*Colorado* v. *Spring*, 479 U.S. 564 (1987)]." 108 S.Ct. at 2099.

Both the panel that decided petitioner's case below and the five judges who dissented from denial of rehearing *en banc* agreed that under the Fifth Amendment rule announced in *Edwards* and applied in *Roberson*, petitioner's conviction was constitutionally infirm. However, the panel denied petitioner the benefit of this rule under a retroactivity analysis based on *Stovall* v. *Denno;* and the respondent, in a brief opposing certiorari filed after this Court revisited the subject of retroactivity in *Teague* v. *Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989), now seeks to uphold the panel's result on the ground that *Roberson* is new law which should not only be applied retroactively to petitioner's case but also strips petitioner of the benefit of *Edwards*. Brief in Opposition at 12-16. This contention is totally without merit.

Teague held that in collateral proceedings "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 109 S.Ct. at 1070 (plurality opinion). The plurality did not "attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes," 109 S.Ct. at 1070, but did offer two general descriptions of a "new rule:" "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," 109 S.Ct. at 1070; *see also Penry* v. *Lynaugh*, ___ U.S. ___, No. 87-6177, slip opinion p. 8 (June 26, 1989); and, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S.Ct. at 1070 (emphasis in original); *see also Penry* v. *Lynaugh*, *supra*, p. 8.

Teague derived its retroactivity analysis from *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which had been drawn heavily upon *United States* v. *Johnson*, 457 U.S. 537

(1982), as endorsing Justice Harlan's separate opinions in *Desist* v. *United States*, 394 U.S. 244, 256 (1969), and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971). Common to all of these analyses is the recognition that "when a decision of this Court merely has applied settled precedents to new and different fact situations, no real question has arisen as to whether the new decision should apply retrospectively;" its retroactivity is "a foregone conclusion." *United States* v. *Johnson*, *supra*, 457 U.S. at 549 (1982); *see also Griffith* v. *Kentucky*, *supra*, 479 U.S. at 324-25 (retroactivity has been the accepted practice "when a decision of this Court did nothing more than apply settled precedent to different factual situations"); *Desist* v. *United States*, *supra*, 394 U.S. at 263 (Harlan, J., dissenting) (a decision would not present retroactivity problems if it "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

This is hardly surprising doctrine. No system of jurisprudence which respects *stare decisis* and views judicial decision-making as bounded by rules of law could conceive that a court is creating a "new rule" whenever it applies a precedent to a slightly different set of facts falling within the plain logical implications of the principle established by the precedent. As Justice Harlan wrote in *Desist*, "one need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." 394 U.S. at 264. And the very concern that animated *Teague*—the importance of "'treating similarly situated defendants the same,'"

109 S.Ct. at 1069-70—precludes saying that a case which substantively does no more than this is creating a "new rule" instead of evenhandedly applying the old one. *See, e.g.*, *Penry* v. *Lynaugh*, *supra*, slip opinion p. 12-13 (June 26, 1989) (a decision that Texas' death penalty statute, as applied, unconstitutionally foreclosed consideration of Penry's mental retardation in mitigation was not a new rule of law but merely an application of the Eight Amendment principles of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)); *Yates* v. *Aiken*, ___ U.S. ___, 108 S.Ct. 534, 538 (1988) (*Francis* v. *Franklin*, 471 U.S. 307 (1985), did not announce a new rule of law but was "merely an application of the principle that governed our decision in *Sandstorm* v. *Montana*, 442 U.S. 510 (1979)"); *Truesdale* v. *Aiken*, 480 U.S. 427 (1987) (per curiam) (reversing a decision of the Supreme Court of South Carolina that denied retroactive effect to *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), and implicitly holding that *Skipper* did not create a new rule of law but only applied the Eighth Amendment principle of *Lockett* v. *Ohio*, *supra*, to a different fact situation).

Teague, like the retroactivity cases that preceded it, is aimed at protecting the justifiable reliance interests of the States. It seeks to avoid the situation in which "'[s]tate courts are . . . frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" 109 S.Ct. at 1075. As the Court had previously noted in *Solem* v. *Stumes*, 465 U.S. 638, 646 (1984):

> In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that

announced by the decision whose retroactivity is at issue. Unjustified "reliance" is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a "clear break with the past." When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a longstanding practice approved by near-unanimous lower-court authority, the reliance and effect factors in themselves "have virtually compelled a finding of nonretroactivity." *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982). *See also id.*, at 551-552. We have been less inclined to limit the effect of a decision that has been "distinctly foreshadowed." *Brown* v. *Louisiana*, *supra*, 447 U.S., at 336.

When a decision simply takes the straightforward step of applying a precedent to a new factual situation that is logically governed by the reasoning of the precedent, making no "break with the past" at all, a state can claim no legitimate reliance interest against giving the benefit of that decision to any person who was entitled to the benefit of the precedent itself.[8]

Such a decision cannot be treated as a "new rule" under *Teague* without subverting *Teague's* own premises. For, as *Teague* noted, quoting Justice Harlan in *Desist*, "'the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles.'" 109 S.Ct. at 1073. Like all other

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[8] Compare *Teague*, where the constitutional ruling that Teague sought—the application of the fair cross-section requirement of the Sixth Amendment to the petit jury panel—had been previously rejected by this Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), and *Akins* v. *Texas*, 325 U.S. 398 (1945). *See* 109 S.Ct. at 1070 n.1.

constitutional principles regulating the conduct of state authorities, those established by this Court to protect the rights of criminal defendants are heavily dependent upon voluntary compliance by state police officers and prosecutors and enforcement by the state courts. Investigating officers, for example, are expected to obey the rule of *Edwards* v. *Arizona:* if they do not, state prosecutors are expected not to offer the resulting confessions in evidence; and if they offer them in evidence, the state courts are expected to exclude them. To paraphrase Justice Harlan in *Mackey*, 401 U.S. at 691, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited" by undermining these expectations. Yet, if the straightforward application of *Edwards* to other fact situations within its logical compass were to be treated as creating a "new rule" for *Teague* purposes, there would be a powerful incentive for the police, prosecutors, and state judges to disobey the "bright line" rule of *Edwards*. Rather than forbearing to offer a confession taken by interrogative methods that should exclude it under *Edwards*, prosecutors would be motivated to offer both the confession and whatever factual distinctions of *Edwards*—plausible or implausible—they could invent. These distinctions might succeed or they might fail in persuading federal judges that *Edwards* was not controlling; but the prosecutor would win either way, since the rejection of any attempted distinction of *Edwards* would constitute a "new rule" sufficient to deprive the defendant and all others in the defendant's temporal cohort of the benefit of *Edwards*. This, of course, is precisely what the respondent is arguing in the present case: that by litigating *Roberson* all the way to this Court and losing it here, Roberson's prosecutors succeeded in denying the benefit of *Edwards* to all similarly situated defendants whose convictions became final between May of 1981 and June of 1988.

The argument does not survive examination. A review of *Arizona* v. *Roberson* plainly reveals that *Roberson* did not create a new rule of criminal procedure, but rather only involved a straightforward application of this Court's prior decision in *Edwards* v. *Arizona*. For example, the *Roberson* Court framed the question presented as whether the Court should "craft an exception to [the rule of *Edwards* v. *Arizona*] . . . for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 108 S.Ct. at 2096. The majority ultimately concluded that Arizona's "attempts at distinguishing the factual setting here from that in *Edwards* are . . . unavailing," and affirmed the judgment of the Arizona Court of Appeals. 108 S.Ct. at 2100-01.[9] Thus, *Roberson* made no break with the past and imposed no new obligation on law enforcement personnel. The result reached by the Court was clearly directly controlled by *Edwards*. In sum, *Roberson* did not originate a new rule of constitutional law under any definition of a "new rule;" it is a classic instance of the point frequently repeated by the Court that " 'when a decision of this Court has merely applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively.' " *Yates* v. *Aiken*, *supra*, 108 S.Ct.

[9] The *Roberson* opinion included the following quote from the decision of the Arizona Supreme Court in *State* v. *Routhier*, 137 Ariz. 90, 669 P.2d 68, 75 (1983).

> The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about a similar offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.

108 S.Ct. at 2096. This Court stated: "We agree with the Arizona Supreme Court's conclusion." *Id.*

at 538 n.3 (quoting *United States* v. *Johnson*, *supra*, 457 U.S. at 549). *See generally Lee* v. *Missouri*, 439 U.S. 461 (1979) (holding that *Duren* v. *Missouri*, 439 U.S. 357 (1979), did not establish a new rule of law because it "did not announce any new standards of constitutional law not evident from the decision in *Taylor* v. *Louisiana*, [419 U.S. 522 (1975)]").

B. Because Petitioner's Case Was Pending On Direct Appeal At The Time That This Court Decided *Edwards* v. *Arizona*, The Court Of Appeals Incorrectly Determined That The "Bright-Line" Rule Established In *Edwards* Did Not Apply In This Case.

Under these circumstances, the question before this Court is whether petitioner is entitled to the benefit of the bright-line rule of *Edwards* v. *Arizona*. The Court of Appeals determined that the Fifth Amendment principle established in *Edwards* and followed in *Roberson* did not apply in petitioner's case because *Edwards* had not been decided at the time of petitioner's arrest in 1980. The panel stated:

> We, therefore, conclude that Butler may challenge his presumptively valid conviction only by demonstrating that there was an actual violation of his constitutional rights in 1980.

864 F.2d at 4; J.A. 136. The modified order of the panel totally ignores one basic fact which is dispositive of this issue: *Edwards* v. *Arizona* was decided while petitioner's case was pending on direct appeal to the South Carolina Supreme Court. Thus this Court has already resolved the retroactivity question presented.

In *Shea* v. *Louisiana*, 470 U.S. 51 (1985), the Court specifically held that *Edwards* applied to cases pending on direct review at the time it was decided. 470 U.S. at 59.

The *Shea* holding was reaffirmed in *Griffith* v. *Kentucky*, *supra*, 479 U.S. at 328, and again in *Teague* v. *Lane* and *Penry* v. *Lynaugh*. The Court of Appeals' decision erroneously focused on the state of the law at the time of petitioner's arrest. However, this Court's recent retroactivity decisions make clear that the controlling inquiry is whether the constitutional rule whose benefit is claimed was in effect at the time the claimant's conviction became final on direct appeal. *See Griffith*, 479 U.S. at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); *Yates* v. *Aiken*, *supra*, 108 S.Ct. at 537 (acknowledging that new rules apply retroactively to cases pending on direct review at the time the rule was established); *Teague*, 109 S.Ct. at 1072-75; *Penry*, slip opinion p. 9 ("This Court's decisions in *Lockett* v. *Ohio*, and *Eddings* v. *Oklahoma*, were rendered before his conviction became final. . . . Under the retroactivity principles adopted in *Griffith* v. *Kentucky*, Penry is entitled to the benefit of those decisions").[10] Thus, because *Edwards* was decided on May 18, 1981, and the South Carolina Supreme Court did not issue its opinion on direct appeal in petitioner's case until February 22, 1982, *Shea* permits no other result than that the "bright-line" rule of *Edwards* applies to this case.

In this respect, petitioner's case is identical to *Yates* v. *Aiken*, *supra*. The question before this Court in *Yates* was whether Yates could claim the benefit of the rule of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), as applied in *Francis* v. *Franklin*, 471 U.S. 307 (1985). *Francis* was

[10] This, of course, is the approach to retroactivity taken in Justice Harlan's seminal opinions on the subject. *See Mackey* v. *United States*, *supra*, 401 U.S. at 689 (Harlan, J.).

decided after Yates' conviction became final on direct review. However, the Court concluded that *Francis* "was merely an application of the principle that governed our decision in *Sandstrom* . . . ." 108 S.Ct. at 538. Therefore, because *Sandstrom* had been decided before Yates' conviction became final on direct review, and because *Francis* was merely a straightforward application of *Sandstrom* to a slightly different sets of facts, the Court held that no genuine retroactivity question was presented in Yates' case. Similarly, because the rule of *Edwards* v. *Arizona* was established before petitioner's conviction became final on direct review, and because *Roberson* was merely an application of *Edwards*, petitioner was entitled to the benefit of both decisions. The Court of Appeals was incorrect in ruling otherwise.[11] *See also Lamp* v. *Farrier*, 763 F.2d 994, 997 n.5 (8th Cir. 1985) (*Edwards* applied to a case tried before *Edwards* but pending on direct appeal at the time *Edwards* was handed down); *accord Flourney* v. *Marshall*, 842 F.2d 875, 878 (6th Cir. 1988); *United States ex rel Adkins* v. *Greer*, 791 F.2d 590, 595 n.3 (7th Cir. 1986); *Greenwalt* v. *Ricketts*, 784 F.2d 1453, 1457 (9th Cir. 1986); *Cervi* v. *Kemp*, 855 F.2d 703, 705 n.9 (11th Cir. 1988).[12]

[11] The order of the Court of Appeals denying rehearing relied exclusively on *Allen* v. *Hardy*, 478 U.S. 255 (1986) (holding that *Batson* v. *Kentucky*, 476 U.S. 79 (1986), did not apply retroactively to cases already final on direct review at the time *Batson* was decided), and *Solem* v. *Stumes*, 465 U.S. 638 (1984) (holding that *Edwards* did not apply retroactively to cases already final on direct review at the time *Edwards* was decided). In its modified order, the Court of Appeals never discussed the applicability of—or even cited—this Court's retroactivity rulings in *Shea* v. *Louisiana* and *Griffith* v. *Kentucky*.

[12] What makes the result reached by the panel in its modified order all the more mystifying is that the panel had previously held that

The Court of Appeals seems to have taken the view that because petitioner's case was before it in a federal habeas corpus proceeding, the proper inquiry was whether *Edwards* was in effect at the time of petitioner's arrest and trial. 864 F.2d at 25; J.A. 135.[13] However, as this Court's decisions reveal, the forum in which a state inmate seeks the benefit of a constitutional decision of the Court is not the touchstone of his rights under that decision. Rather, the applicability of the decision turns on the stage that the inmate's case had reached at the time when the decision was handed down. If the decision was handed down *before the inmate's* case became final on direct

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Edwards did apply retroactively to petitioner's case. In its original decision, the panel noted that the district court had erroneously concluded that *Edwards* was not applicable because it had not been decided at the time of petitioner's trial.

> Unfortunately, the district court's failure to address this claim on the merits must be regarded as error. Although *Edwards* does not have retroactive effect, it does apply to cases pending on direct appeal at the time it was decided. *Shea* v. *Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985). Butler's appeal was in fact pending at that time. We must, therefore, consider whether Butler's interrogation did produce incriminating statements in violation of his right to counsel.

Butler v. *Aiken*, 846 F.2d at 257; J.A. 129. In its order modifying its previous opinion, the panel apparently reversed itself on this issue.

[13] The panel stated:

> The subsequent interrogation concerning the Lane murder, occurring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial. It does not follow, however, that Butler is entitled to habeas relief based upon a rule of law that was not in effect at the time of his arrest and trial.

Id.

review, he is entitled to its benefit.[14] The Court of Appeals below ignored this well settled point, and its decision, therefore, must be reversed.

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[14] At the risk of belaboring the obvious, petitioner would note that any other conclusion would lead to anomalous results. If the retroactivity of a constitutional rule turned solely on the stage of the proceedings in which the retroactivity question arose, without regard to when the rule was established, a state court could effectively eliminate federal habeas corpus review by the simple expedient of refusing to give effect on direct appeal to new constitutional decisions of this Court. This would essentially give the state courts the power to nullify the decisions and constitutional principles established by the Court, without protecting any legitimate state interest. In short, the rule apparently adopted by the Court of Appeals would effectively turn the Supremacy Clause on its head.

CONCLUSION

Because the result reached by the Court of Appeals is in direct conflict with the applicable holdings of this Court regarding the retroactivity of constitutional decisions, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus.

Respectfully submitted,

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